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Nos. 86-622 and 86-737

In the Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 38 U.S.C. 211(a) precludes judicial review of a decision by the Veterans Administration denying a veteran's application to extend the statutory period within which the veteran may receive educational benefits.

2. Whether, if we assume that judicial review is not barred, the denial of benefits in these cases violated the Rehabilitation Act, 29 U.S.C. 794.

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No. 86-622

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OPINIONS BELOW

The opinion of the court of appeals in No. 86-622 (Pet. App. 1a-38a) is reported at 791 F.2d 226. The opinion of the district court in No. 86-622 (Pet. App. 39a-82a) is reported at 606 F. Supp. 391. The opinion of the court of appeals in No. 86-737 (Pet. App. 1a-31a) is reported at 792 F.2d 194. The opinion of the district court in No. 86-737 (Pet. App. 32a-47a) is reported at 596 F. Supp. 1317.

JURISDICTION

The judgment of the court of appeals in No. 86-622 was entered on May 16, 1986. A petition for rehearing was denied on July 15, 1986 (Pet. App. 86a-87a). The petition

for a writ of certiorari was filed on October 14, 1986 (a Tuesday following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 86-737 was entered on May 30, 1986. A petition for rehearing was denied on August 7, 1986 (Pet. App. 49a). The petition for a writ of certiorari was filed on November 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. 211(a) provides, in pertinent part:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus of otherwise.

Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. I 1977) 1662 provided, in pertinent part:

> (a)(1) No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be

granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education.

* * * * *

(e) No educational assistance shall be afforded any eligible veteran under this chapter or chapter 36 of this title after December 31, 1989.

38 C.F.R. 3.301(c)(2) provides:

Alcoholism. The simple drinking of alcoholic beverages is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

STATEMENT

1. The Veterans Benefits Law authorizes the payment of educational benefits to veterans within ten years following the date of discharge. No educational assistance may be paid after that ten-year period expires unless the veteran was unable to pursue an education within that period "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. 1662(a)(1). In the cases presently before the Court, petitioners are veterans who did not receive full

educational benefits during their respective ten-year periods. In each case, petitioner sought to extend his period of eligibility, contending that he was disabled during part of the ten-year period because of alcoholism. The Veterans Administration (VA) denied extensions to both petitioners in accordance with its longstanding policy that alcoholism not resulting from an underlying psychiatric disorder constitutes "willful misconduct."

The applicable VA regulation (38 C.F.R. 3.301(c)(2)), promulgated in 1972, was designed to incorporate principles set forth in greater detail in a 1964 VA administrative decision. 38 Fed. Reg. 20335-20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation).[1] The 1964 administrative decision, drawing on VA benefits decisions dating back to 1931, distinguishes between "primary" alcoholism and alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder" (Administrator's Decision, Veterans Administration No. 988, Interpretation of the Term "Willful Misconduct" As Related To The Residuals of Chronic Alcoholism (Aug. 13, 1964) (86-622 Pet. App. 139a, 143a-144a)). Such "secondary" alcoholism is not considered willful misconduct (*id.* at 144a). Nor does the 1964 VA decision regard as the product of willful misconduct any organic disorder caused by chronic alcoholism, such as cirrhosis of the liver. "While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and *wills* the disease and disabilities which sometimes appear as secondary effects." *Id.* at 145a (emphasis in original).

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[1] A companion provision (38 C.F.R. 3.301(c)(3)) establishes similar standards for determining when drug usage constitutes willful misconduct.

2. *No. 86-622*: Traynor was discharged from the Army on August 27, 1969. He entered college in 1977 and received veterans' education assistance benefits until those benefits were terminated when his ten-year period of eligibility expired on August 27, 1979. Traynor, who had used nine and one-half of the 24 months of benefits available to him (based on length of service), sought to have his period of eligibility for benefits extended. He contended that he had been unable to utilize his full benefits within ten years of discharge because he had suffered from alcoholism for 15 years ending in 1974.

During the administrative proceedings, Traynor asserted that the VA regulation setting forth the circumstances in which alcoholism constitutes willful misconduct is violative of the Rehabilitation Act, 29 U.S.C. 794. The Board of Veterans Appeals did not expressly adjudicate that statutory claim, noting that it was bound by VA regulations. The Board did, however, explain that the consistent VA policy (86-622 Pet. App. 117a) is:

> [t]hat alcoholism can and should be considered an illness for purposes of medical treatment and rehabilitation, and that the simple drinking of any alcoholic beverage is not in and of itself willful misconduct. On the other hand, if in the consumption of alcohol for the purpose of enjoying its intoxicating effects excessive indulgence leads to disability, such disability will be considered the result of the person's willful misconduct.

Noting that "Congress has never enjoyed the luxury of having unlimited funds with which to provide for gratuitous Veterans Administration benefits," the Board explained that historically benefits have not been granted for a disability that results from willful misconduct (*id.* at 117a-118a). The Board observed that alcoholism has been

regarded as potentially disqualifying misconduct ever since the earliest veterans regulations promulgated by President Roosevelt. It added that (*id.* at 118a-119a):

> Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself/herself. Alcoholism is not singled out for special consideration; other disabilities may be considered the result of willful misconduct, under appropriate circumstances. Whether the illness i[n] question is alcoholism or some other disability, the Veterans Administration evaluates the circumstances of each individual in determining willful misconduct.

Finding no error in its prior determination that the facts of this case warranted a finding of willful misconduct, the Board denied Traynor's request for benefits beyond the delimiting date.

Traynor then filed suit in the United States District Court for the Southern District of New York. He alleged that the VA decision was violative of the Rehabilitation Act, the Due Process Clause and the Equal Protection component of the Fifth Amendment. The district court held that "[s]ince [the complaint] requires us to examine constitutional and statutory questions and not merely issues of VA policy, we conclude, in accordance with the Supreme Court's holding in *Johnson* [v. *Robison*, 415 U.S. 361 (1974)], that we are not precluded from exercising our jurisdiction in this matter by 38 U.S.C. § 211(a)." 86-622 Pet. App. 58a-59a. On the merits, the district court rejected the constitutional challenge (*id.* at 59a-64a), but held that the VA decision violated the Rehabilitation Act. The court held that alcoholism is a handicap covered by

the Rehabilitation Act (*id.* at 69a-72a), and that the denial of benefits constitutes discrimination against alcoholics forbidden by that Act.

The court of appeals for the Second Circuit reversed. The panel majority held that judicial review of the Rehabilitation Act issue was precluded by 38 U.S.C. 211(a). The court stated (86-622 Pet. App. 16a-17a) that although "many veterans have in the service of our country suffered injuries that qualify them as 'handicapped individual[s]' for purposes of Section 504 [of the Rehabilitation Act] * * * Congress did not delineate any exception to section 211(a) for 'handicapped' veterans when it passed section 504." Thus, the court explained, there was no basis for concluding that Congress intended "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans." 86-622 Pet. App. 17a.

Judge Kearse dissented on the jurisdictional issue.[2] In her view, Section 211(a) does not bar judicial review because the Rehabilitation Act neither provides benefits to veterans nor is it administered by the VA (86-622 Pet. App. 32a). In addition, Judge Kearse deemed Section 211(a) to be inapplicable here because there was no decision of the Administrator on the Rehabilitation Act issue, the Board of Veterans Appeals having "refused, on the ground of lack of authority, to decide whether the challenged regulations violated the Rehabilitation Act" (86-622 Pet. App. 36a).

3. *No. 86-677*: Petitioner McKelvey was discharged from the Army in September 1966. During the next nine years he was hospitalized at various times for alcoholism and associated conditions. He did not apply for veteran's educational benefits until more than 10 years had elapsed following his discharge. The VA, finding "no evidence that an acquired psychiatric disease preceded [McKelvey's]

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[2] She expressed no view on the merits (86-622 Pet. App. 38a).

alcoholism" (86-737 Pet. App. 5a), denied his request to extend his period of eligibility and rejected his application for benefits.

McKelvey filed suit in the United States District Court for the District of Columbia. He challenged his denial of benefits on the ground that it was based on a misconstruction of the "willful misconduct" language of the veterans benefits statute. He contended also that the VA decision constituted discrimination against the handicapped in violation of the Rehabilitation Act, an argument he had not presented in the administrative proceedings.

The district court held that it had jurisdiction to consider McKelvey's claims, stating that Section 211(a) "does not prevent judicial review of challenges to the VA's authority to promulgate regulations." 86-737 Pet. App. 36a. On the merits, the district court held that the VA had properly interpreted the "willful misconduct" standard of the veterans' benefits statute. The court noted that when Congress enacted the educational benefits extensions, the VA interpretation of "willful misconduct" already existed (in connection with earlier provisions on disability compensation), and that Congress specifically expressed an intent that the same interpretation be used (*id.* at 40a, quoting S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977)). The district court reached a different conclusion on the Rehabilitation Act claim, holding that the VA interpretation constitutes discrimination against alcoholics in violation of Section 504. 86-737 Pet. App. 43a.

The court of appeals for the District of Columbia Circuit reversed. The court held that while Section 211(a) does not preclude judicial review of the Rehabilitation Act claim, petitioner's substantive statutory claim has no merit.

The court of appeals' decision on the jurisdictional issue rests on "the unusual, perhaps *sui generis* posture of this case" (86-737 Pet. App. 6a). The court focused on two

particular facts: first, that a veteran is challenging the validity of a regulation under the Rehabilitation Act, a legal issue the Board of Veterans Appeals regarded itself as lacking authority to decide, and second, that the VA had not otherwise made a determination on that issue prior to the filing of this lawsuit[3] (*id.* at 7a). Since, in the court's view, Section 211(a) is applicable only when a claim has been "resolved by an actual 'decision of the Administrator' " (*ibid.*, quoting *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974)), it does not bar judicial review in these circumstances. The court emphasized "the narrowness of our holding" (86-737 Pet. App. 9a):

> [W]e do not anticipate another occasion to review a VA order on the basis that supports our review today. The VA has now determined it does have authority to decide on the effect and applicability of federal statutes other than veterans' legislation when the agency acts on benefits claims. We therefore expect that the VA will not again regard as outside the arsenal of law it applies any potentially relevant congressional enactment.

On the merits, the court concluded that the VA could reasonably distinguish between those whose handicap was caused by their own willful misconduct, and those who are not responsible for their handicap. The VA's conclusion that alcoholics who cannot show an underlying psychiatric disorder are chargeable with willful misconduct reflects "general societal perceptions regarding personal responsibility." 86-737 Pet. App. 12a. Moreover, since

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[3] In response to the court's request at oral argument, the General Counsel of the VA took the position that the Rehabilitation Act does not invalidate the VA's interpretation of the "willful misconduct" language in Section 1662. The court held, however, that the General Counsel's letter did not constitute a "decision of the Administrator" for purposes of Section 211(a), since it was written after the case started. 86-737 Pet. App. 7a-8a.

"[a]lcoholism, unlike any other disability except drug addiction * * *, is self-inflicted * * * [,] [i]t is therefore feasible for alcoholism, as it is not for all other disabilities except drug addiction, to make a generalized determination that willfulness exists unless there is established the singular exculpation for self-infliction (psychiatric disorder) that the agency has chosen to acknowledge" (*id.* at 16a).

In a separate opinion, Judge Ginsburg concurred in the court's holding that Section 211(a) does not bar judicial review in the unique circumstances of this case, and she dissented from the court's holding on the merits (86-737 Pet. App. 17a).

Judge Scalia also wrote separately. He dissented from the court's holding that Section 211(a) is not applicable, stating that the "decision of the Administrator" which Section 211(a) immunizes from judicial review necessarily includes all issues within the competence of the agency to decide, "whether or not [the agency] specifically adverts to, or is even aware of them—just as a court necessarily 'decides' all issues logically essential to the validity of its holding, whether or not it explicitly addresses or considers them." 86-737 Pet. App. 30a. Any other view of Section 211(a), he wrote, would enable "the Administrator * * * to control the scope of judicial review of his determinations by simply designating which underlying issues he chooses not to decide" (86-737 Pet. App. 30a). Judge Scalia concurred in the court's decision on the merits, upholding the validity of the VA regulation.

ARGUMENT

The judgments of the courts of appeals are correct and do not conflict with any decision of this Court. Although the courts of appeals have not achieved complete uniformity in deciding the questions raised in these petitions, the alleged conflicts are neither as pervasive nor as important

as petitioners suggest. Accordingly, we do not believe that the present cases warrant an exercise of this Court's certiorari jurisdiction. Should the issues prove to be recurring, they will presumably arise in cases that are less idiosyncratic—and thus more appropriate for further review—than those now before the Court.

1. The petition in No. 86-622 raises the question whether 38 U.S.C. 211(a) precludes judicial review in these circumstances. While there is some tension among the courts of appeals on this issue, the extent to which there is a square conflict of authority is not entirely clear. The courts have generally accepted the principle stated in Section 211(a) and repeated by this Court, that ["j]udicial review of VA [benefits] decisions is precluded by statute." *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985). The courts have articulated only two limited exceptions to the statutory bar on judicial review: where a challenge is made to the constitutionality of a *statute* (*Johnson* v. *Robison*, 415 U.S. 361 (1974)), and where a challenge to a VA policy is made, not by a party seeking benefits, but by a third party affected by the policy who has no opportunity to be heard in administrative proceedings.[4]

In situations where neither of these limited exceptions obtains, the general rule has prevailed, precluding judicial review of benefits decisions at the behest of the veteran. *E.g.*, *Barefield* v. *Byrd*, 320 F.2d 455 (5th Cir. 1963); *Milliken* v. *Gleason*, 332 F.2d 122 (1st Cir. 1964), cert.

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[4] See, *e.g.*, *Evergreen State College* v. *Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Wayne State University* v. *Cleland*, 590 F.2d 627 (6th Cir. 1978). These cases were not brought by veterans seeking review of denials of benefit claims. Rather, they were brought by "educational institutions interested in the overall administration of the VA educational benefits program" (86-622 Pet. App. 18a).

denied, 379 U.S. 1002 (1965); *Redfield* v. *Driver*, 364 F.2d 812 (9th Cir. 1966); *Fritz* v. *Director of Veterans Administration*, 427 F.2d 154 (9th Cir. 1970); *Wickline* v. *Brooks*, 446 F.2d 1391 (4th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *Ross* v. *United States*, 462 F.2d 618 (9th Cir. 1972); *De Rodulfa* v. *United States*, 461 F.2d 1240 (D.C. Cir. 1972); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd without opinion, 477 F.2d 600 (6th Cir. 1973); *Anderson* v. *VA*, 559 F.2d 935 (5th Cir. 1977); *Rosen* v. *Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); *Pappanikoloaou* v. *Administrator of the Veterans Administration*, 762 F.2d 8, 9 (2d Cir. 1985).

Petitioner attempts to avoid the preclusive effects of the statute by contending that he is challenging the validity of a regulation rather than the benefits decision in a particular case. Aside from the fact that petitioner does indeed challenge his individual benefits determination, no court of appeals has recognized the new exception to Section 211(a) petitioner proposes. Indeed, the only other court of appeals that has ruled conclusively on petitioner's proffered justification for judicial review has, like the Second Circuit, expressly rejected it. *Roberts* v. *Walters*, 792 F.2d 1109 (Fed. Cir. 1986).[5] The District of Columbia Circuit in *McKelvey* voiced no disagreement with the Second Circuit's decision in *Traynor*. It reached a different result only "[b]ecause of the unusual, perhaps *sui generis*,

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[5] The cases petitioner alleges to be in conflict with the decision of the Second Circuit below are all distinguishable (see 86-622 Pet. 27 n.1). In *Tinch* v. *Walters*, 765 F.2d 599 (1985), the Sixth Circuit reached the merits of a veteran's contention that 38 C.F.R. 3.301(c)(2) violates the Rehabilitation Act, but the court did not address the question whether Section 211(a) precluded judicial review. It therefore cannot be predicted how the Sixth Circuit would rule if it were to face that issue. Compare *Holley* v. *United States*, *supra*, with *Wayne State University* v. *Cleland*, *supra*. The remaining cases upon which petitioner relies did not involve claims by veterans challenging denials of benefits (see note 4, *supra*).

posture" of the case before it, expressly disclaiming "a definitive decision on the breadth" of Section 211(a) and stating that "we do not anticipate another occasion to review a VA order on the basis that supports our review today" (86-737 Pet. App. 6a, 9a).

Even if there were a clear conflict among the courts of appeals, the present cases involve singular facts that would diminish the precedential value of any decision by this Court on the scope of Section 211(a).[6] Accordingly, further review is not warranted.

2. a. Both petitions raise the substantive question whether petitioners are entitled to extend their periods of eligibility for benefits under 38 U.S.C. 1662(a).[7] Although a conflict exists on this issue between the decision of the District of Columbia Circuit in *McKelvey* and the decision of the Sixth Circuit in *Tinch* v. *Walters*, 765 F.2d 599 (1985), the limited prospective impact of that conflict leads us to conclude that review is not warranted.[8]

Subsection (e) of Section 1662 provides that "[n]o educational assistance shall be afforded any eligible veteran under this chapter * * * after December 31, 1989." In view of the impending expiration of the program, we concur in petitioner McKelvey's prediction that cases under this program "may not arise in the future." 86-737

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[6] In neither case now before the Court did the VA address the merits of the statutory claim presented for judicial review. These cases are therefore cluttered with two threshold questions: whether the VA may consider such statutory claims and whether there was any "decision[] of the Administrator" on the merits of the issue on which judicial review is sought. Future cases should not be so burdened. The court of appeals in *McKelvey* instructed the VA "not [to] regard as outside the arsenal of law it applies any potentially relevant congressional enactment." 86-737 Pet. App. 9a.

[7] The Second Circuit of course did not reach this issue in light of its holding under Section 211(a).

[8] The government did not file a petition for a writ of certiorari in *Tinch*.

Pet. 12 n.8.[9] Even at present, the question raised here will affect only a few cases involving that program. The VA advises that in the past two years only 13 veterans have sought on account of alcoholism to extend the period within which they may receive educational benefits.[10] Moreover, since the educational benefits extension legislation has several unique features that will affect the analysis of the Rehabilitation Act issue, it is questionable whether a decision in these cases would be dispositive in cases arising under other programs of more general application.

b. Like every other qualified veteran—handicapped and non-handicapped, alcoholic and non-alcoholic—each petitioner had a ten-year period of eligibility for educational benefits.[11] Persons in petitioners' circumstances therefore had some meaningful access to the relevant benefit. Cf. *Alexander* v. *Choate*, 469 U.S. 287, 301-306 (1985) (Rehabilitation Act is not violated by state Medicaid rule that had disparate impact on the handicapped). There is no claim that any action, regulation or decision by the VA denied benefits to petitioners during the statutory delimiting period, much less that any such denial constituted discrimination violative of the Rehabilitation Act. Rather, these cases are confined to the contention

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[9] Because of the relatively small number of cases arising under 38 U.S.C. 1662(a) that would be affected by the issue in this case (see note 10, *infra*), the potential absence of nationwide uniformity should not impose substantial inconvenience in administering this program until its expiration in 1989.

[10] The VA informs us that since 1979 (two years following adoption of the extension legislation), the Board of Veterans Appeals has decided the following numbers of cases involving alcoholics seeking extensions of the ten-year post-discharge period for utilizing educational benefits under 38 U.S.C. 1662(a): 1979—20; 1980—26; 1981—14; 1982—13; 1983—16; 1984—15; 1985—3; 1986—10).

[11] Petitioner Traynor in fact received veterans' educational benefits during that period.

that petitioners are entitled to have their eligibility periods extended—a privilege that is not available to non-disabled veterans. As the District of Columbia Circuit recognized (86-737 Pet. App. 11a n.2), petitioners' claim differs from the issue that more commonly arises under the Rehabilitation Act, *viz.*, whether discrimination exists between handicapped individuals and others. Here, petitioners' claim is one of "discrimination between various categories of handicapped individuals." *Ibid.*; see *Colin K.* v. *Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983).[12]

c. In Section 1662(a) Congress chose to extend the period of eligibility for federal benefits only to those disabled veterans whose disabilities were not caused by their own willful misconduct. In so doing, Congress drew on a long line of similar enactments and a consistent history of VA interpretation. For many years Congress has provided a "willful misconduct" exception to veterans' eligibility for service-connected disability compensation (see 38 U.S.C. 310; 86-622 Pet. App. 118a). In 1964, in a case arising under the disability compensation program, the VA explained in detail its interpretation of "willful misconduct" as applied to alcoholism, an interpretation that has roots in cases dating back to 1931. It was against this background that Congress in 1977 adopted the "willful misconduct" standard for educational benefits extensions (38 U.S.C. 1662(a)(1)). The Senate Veterans Affairs Committee stated that "[i]n determining whether the disability sustained was the result of the veterans' own 'willful misconduct,' the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38." S. Rep. 95-468,

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[12] The facts of the present cases are even more rarefied. Since petitioners are now able to pursue educational programs, their Rehabilitation Act claim is that they are now being discriminated against solely on account of a past disability. There is no claim that they are the victims of present discrimination because of a present disability.

95th Cong., 1st Sess. 69-70 (1977). Indeed, the Senate Report expressly refers to the VA policy involved here (which has not been changed since 1977).[13]

In light of this plain statutory language and legislative history, the VA's continued adherence to the interpretation expressly approved in the Senate Report was surely faithful to congressional intent.[14]

d. Petitioners do not quarrel with *Congress's* authority to exclude from the scope of the benefits-extension legislation those whose disability is the product of "willful misconduct." Moreover, as the District of Columbia Circuit recognized (86-737 Pet. App. 10a), petitioners

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[13] The Senate Report cites VA Manual 21-1, § 14.04 (Jan. 29, 1976) (see C.A. App. 13 *et seq.*). Section 14.04c states that "[b]asic principles for application in deciding cases involving alcoholism are stated in Administrator's decision No. 988 * * *." Administrator's Decision No. 988 is the administrative policy decision involved in this case. See 86-622 Pet. App. 139a-147a.

[14] There is no merit to petitioners' contention that the 1977 legislation was superseded by Congress's action in 1978 extending the Rehabilitation Act to federal agencies. The 1978 amendment to the Rehabilitation Act made no reference to the veterans' benefits program. Repeals by implication are not favored, especially where the later statute is general and the earlier statute is specific. *Radzanower* v. *Touche, Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963).

At all events, the Rehabilitation Act does not require the VA to make the extension provision available to all veterans or even to all disabled veterans. Under regulations implementing the Rehabilitation Act promulgated by the Secretary of Health and Human Services, "the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited * * *" (45 C.F.R. 84.4(c); see also 28 C.F.R. 41.51(c)). This Court has stated that the Secretary's regulations constitute "an important source of guidance on the meaning of § 504." *Alexander* v. *Choate*, 469 U.S. at 304 n.24; *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979).

"presumably * * * would not object to a VA regulation that stated nothing more than, 'those alcoholics whose alcoholism is attributable to their own willful misconduct are ineligible for educational benefits extensions.' " Since petitioners do not contend that alcoholism can never be willful misconduct under the statute, these cases are reduced either to the essentially factual question whether petitioners' alcoholism constituted willful misconduct, or to the narrow legal question whether the standard the VA has employed for decades, and that Congress has expressly approved, is a reasonable basis for determining when alcoholism is willful misconduct.

Given these circumstances, the present cases do not merit further review. Should the question whether the VA regulation violates the Rehabilitation Act arise in a context with broader programmatic significance—*e.g.*, disability benefits—the Court could decide at that time whether review is warranted.[15]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[15] A case involving disability benefits is presently pending in the Third Circuit. *Buck* v. *VA*, No. 86-1656.

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